STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 31, 2005
v	No. 254240 Delta Circuit Court
VINCENT MATTHEW PAPINEAU, Defendant-Appellant.	LC No. 03-006993-FH

Before: Murray, P.J., and O'Connell and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right his convictions of aggravated domestic violence, MCL 750.81a(2), and witness intimidation, MCL 750.122(3)(c) (threats or intimidation). The trial court sentenced him to ninety-three days in jail for the aggravated domestic violence conviction and eight months in jail and twelve months' probation for the witness intimidation conviction. We affirm.

Defendant first argues that the evidence is insufficient to sustain his witness intimidation conviction. This Court reviews de novo a claim regarding the sufficiency of the evidence. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). The test for determining whether sufficient evidence has been presented to sustain a conviction is whether, viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000). "The standard of review is deferential: a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *Id.* at 400. "'Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime.'" *Id.*, quoting *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999).

By enacting the witness intimidation statute, MCL 750.122, the Legislature intended "to identify and criminalize the many ways individuals can prevent or attempt to prevent a witness from appearing and providing truthful information in some sort of official proceeding." *People v Greene*, 255 Mich App 426, 438; 661 NW2d 616 (2003). Defendant was convicted of violating MCL 750.122(3)(c), which provides:

> (3) A person shall not do any of the following by threat or intimidation:

* * *

> (c) Encourage or attempt to encourage any individual to avoid legal process, to withhold testimony, or to testify falsely in a present or future official proceeding.

The elements of witness intimidation under MCL 750.122(3)(c) are that a person: (1) by threat or intimidation (2) encourages or attempts to encourage any individual (3) to testify falsely (4) in a present or future official proceeding. MCL 750.122(3)(c). In addition, the person must "know[] or ha[ve] reason to know the other person could be a witness at any official proceeding." MCL 750.122(9).

Defendant first challenges the sufficiency of the evidence regarding the "official proceeding" element of the offense. "'Official proceeding' means a proceeding heard before a legislative, judicial, administrative, or other governmental agency or official authorized to hear evidence under oath, including a referee, prosecuting attorney, hearing examiner, commissioner, notary, or other person taking testimony or deposition in that proceeding." MCL 750.122(12)(a). Defendant concedes that the type of proceeding at issue in this case is a judicial proceeding. However, defendant contends that the evidence was insufficient to establish that his conduct was designed to affect testimony at an "official proceeding" because defendant's alleged threat to have his friends in the sheriff's department help him get the victim committed to a psychiatric ward was made a few days after the victim was assaulted and no proceedings were pending against defendant at that time. Defendant further alleges that his intent in making the statements to the victim was to avoid, rather than influence, any "official proceedings" and that because his comments were made before the pendency of any official proceedings, any contention that he intended to affect the victim's in-court testimony is merely speculative.

Defendant's argument overlooks MCL 750.122(9), which specifically states that the witness intimidation statute "applies regardless of whether an official proceeding actually takes place or is pending." The plain language of the statute does not require the pendency of an official proceeding as an element of the offense. If the language in a statute is not ambiguous, this Court must apply the statute as written. *Greene*, *supra* at 434. In light of the plain language of MCL 750.122(9), we reject defendant's contention that there was insufficient evidence to establish that defendant encouraged the victim to testify falsely at an "official proceeding."

Defendant also argues that he lacked the requisite knowledge under the witness intimidation statute because he did not know or have reason to know that the victim could be a witness at an official proceeding as required by MCL 750.122(9). Again, we disagree.

MCL 750.122(9) provides that the witness intimidation statute "applies . . . if the person knows or has reason to know the other person could be a witness at any official proceeding." Although defendant denied that he was the perpetrator of the victim's injuries, this Court must view the evidence in a light most favorable to the prosecution in reviewing whether there was sufficient evidence to sustain a conviction. Furthermore, circumstantial evidence and the reasonable inferences arising from the evidence may constitute sufficient evidence of the elements of a crime. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993). The victim's testimony at trial, when viewed in a light most favorable to the prosecution, is sufficient to establish defendant's identity as the perpetrator in this case. Furthermore, it can be inferred that

defendant, as the perpetrator of the assault against the victim, either knew or had reason to know of the possibility of future judicial proceedings as a result of the assault.

We reject defendant's contention that he could not have been on notice of the possibility of a judicial proceeding until he was arrested or until the institution of formal proceedings against him at an arraignment. It is this Court's function "'to fairly interpret a statute as it then exists; it is not the function of the court to legislate.'" *In re Blackshear*, 262 Mich App 101, 111; 686 NW2d 280 (2004), quoting *People v Jahner*, 433 Mich 490, 501; 446 NW2d 151 (1989) (citation omitted). MCL 750.122, as written, does not include a provision defining the moment when a person knows or has reason to know that another person could be a witness at any official proceeding. This Court will not read a provision into a clear statute if such a provision is not within the manifest intention of the Legislature as derived from the language of the statute itself. *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002). If the Legislature had intended to conclusively establish a time frame in which a person would be said to know or have reason to know that another person could be a witness at an official proceeding, it could have so provided in MCL 750.122. It did not do so. We therefore reject defendant's arbitrary assignment of the time of arrest or arraignment as the moment at which a person either knows or has reason to know that another person could be a witness at an official proceeding.

Defendant next argues that the prosecutor committed misconduct by making improper character evidence arguments during closing argument and that defense counsel was ineffective in failing to object to the prosecutor's improper comments. Specifically, defendant contends that the prosecutor improperly argued that because defendant mentioned his friendship with the police when he was arrested, that defendant must have also, as the victim claimed at trial, threatened to use his friends on the police force to help him have the victim committed to a psychiatric ward. According to defendant, the prosecutor made an improper argument about defendant's character to show his propensity to commit the offenses of which he was charged.

Defendant specifically argues that the following arguments that the prosecutor made during closing argument were improper:

> And how do you know that's true, ladies and gentlemen? Well, you heard it from two witnesses; and, two, when he's arrested, what does he tell this man right here? Ooh, my cop connection, my friend over in the sheriff's department, he's going to get me out of this.
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> * * *
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> He [defendant] used those threats, he used this relationship—or alleged relationship with the police, just like he used it with Trooper Sailer, to those two girls to get them to change their story.

Issues of prosecutorial misconduct are decided on a case-by-case basis. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). The reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. *Id.* Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000), abrogated in part on other grounds by *Crawford v Washington*, 541

US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004). The test of prosecutorial misconduct is whether the defendant was denied a fair trial. *Noble*, *supra* at 660.

A claim of prosecutorial misconduct is generally reviewed de novo. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001). However, defendant failed to preserve this issue for review because he did not object to the prosecutor's allegedly improper remarks during closing argument. Appellate review of alleged prosecutorial misconduct is precluded if the defendant fails to timely and specifically object unless an objection could not have cured the error or a failure to review the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994); *People v Kelly*, 231 Mich App 627, 638; 588 NW2d 480 (1998). Absent a timely and specific objection, this Court reviews for plain error a defendant's claim of prosecutorial misconduct. *Carines*, *supra* at 761-767; *Schutte*, *supra* at 720. To avoid forfeiture under the plain error rule, three requirements must be met: (1) error must have occurred, (2) the error was plain, and (3) the plain error affected substantial rights. *Carines*, *supra* at 763. Under the third requirement, a showing of prejudice is necessary; a defendant has been prejudiced if "the error affected the outcome of the lower court proceedings." *Id*.

We reject defendant's claim that the prosecutor's arguments were improper. The prosecutor's comments were based on evidence that was introduced at trial. The victim testified that defendant threatened to use his friends on the police force to help get her committed to a psychiatric ward if she did not change her story. In addition, Officer George Sailer testified that when he arrested defendant, defendant immediately made a call on his cell phone to an individual that he knew who was a member of the sheriff's department and told Officer Sailer that his friend would "get him out of this." Prosecutors are "'free to argue the evidence and all reasonable inferences from the evidence as it relates to [their] theory of the case.'" *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995), quoting *People v Gonzalez*, 178 Mich App 526, 535; 444 NW2d 228 (1989). Moreover, we observe that during defendant's closing argument, defense counsel also commented on the evidence regarding defendant's friends on the police force and the fact that defendant threatened to have the victim sent to the psychiatric ward. Reversible error may not be predicated on any alleged error to which the aggrieved party contributed by plan or negligence. *Lewis v LeGrow*, 258 Mich App 175, 210; 670 NW2d 675 (2003).

While defendant argues on appeal that the prosecutor erred in arguing this evidence, he does not specify how the prosecutor's reference to defendant's comments to Officer Sailer when he was arrested constituted an attempt to prove that defendant acted in conformity with any character trait with respect to the charged offense. In addition, we observe that the testimony that the prosecutor based her arguments upon was not elicited as bad acts evidence and was not admitted pursuant to MRE 404(b). Furthermore, we note that never during closing argument did the prosecutor implicitly or explicitly urge the jury to consider defendant's bad character in rendering its verdict.

It is apparent from the record that the prosecutor referred to the fact that defendant also told Officer Sailer about his friend on the police force in an effort to bolster the victim's credibility. "[A] prosecutor may comment on his own witnesses' credibility during closing argument, especially when there is conflicting evidence and the question of the defendant's guilt depends on which witnesses the jury believes." *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004). In this case, the victim's credibility was a primary issue at trial because her

story about who assaulted her was not consistent, and defendant's guilt depended, to a large degree, on the credibility of the victim. The prosecutor, in arguing the evidence, was attempting to corroborate the victim's testimony. The prosecutor never urged the jury to convict defendant based on his bad character.

We find that the prosecutor's statement during closing argument were proper comments on the evidence and did not result in plain error. We are not convinced that the prosecutor's comment resulted in the conviction of an innocent defendant or seriously affected the fairness, integrity, or public reputation of the proceedings. *Carines*, *supra* at 774.

Defendant finally argues that defense counsel's failure to object to the prosecutor's comments deprived him of the effective assistance of counsel. Because defendant did not move for a new trial or evidentiary hearing on this claim, our review is limited to the existing record. *Thomas*, *supra* at 456. The prosecutor's comments during closing argument were not improper; therefore, defense counsel was not ineffective in failing to object to them. Counsel is not ineffective for failing to make a futile objection. *Id.* at 457. Defendant has therefore failed to meet his burden of demonstrating ineffective assistance of counsel.

Affirmed.

/s/ Christopher M. Murray
/s/ Peter D. O'Connell
/s/ Pat M. Donofrio